In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 266

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

v.

MAZINE Z. FOX ET AL.

No. 267

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

v.

PHILLIP LOUIS PARKS ET AL.

No. 268

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

v.

JACOB F. OTTMULLER

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR REHEARING

Comes now the Solicitor General, on behalf of the petitioner, and respectfully prays that the judg-

ments heretofore entered in the above-entitled causes be vacated, that the issuance of the mandates thereon be stayed, and that a rehearing be granted.

The petitioner respectfully asks reconsideration of these cases. (1) The decision of this Court must inevitably lead to serious consequences in the administration of the Reclamation Fund. (2) The opinion establishes a novel rule of water rights which is directly contrary to the admittedly applicable law of Washington. (3) No compensatory advantage in the administrative law relating to Reclamation projects is gained by substituting an injunction suit for an action on the contract.

First. The consequences of the decision with respect to the administration of the Reclamation Fund established by Congress are best brought out by examination of the *Ottmuller* case, No. 268.

Ottmuller's contract was for three acre-feet per annum per acre, or so much thereof as shall constitute the proportionate share per acre from the water supply actually available for the lands under the project (Opinion, p. 3, n. 1). The Court holds that Ottmuller, who alleged no source of his water right save under his contract and delivery by the Secretary, has a vested water right through user for 5.56 acre-feet of water per annum because the Secretary in fact delivered the larger amount. The basis of Ottmuller's right cannot be direct diversion from the natural flow of the stream, for Ottmuller never made any such diversion. It cannot be con-

tract, for Ottmuller's contract plainly entitled him to no more than a maximum of three acre-feet. If, then, the opinion of the Court is to stand, it must follow that there has been established a new source of water rights, namely, continuous receipt of water over and beyond any original legal obligation. In substance, this amounts to a nonadverse prescription enforceable against a gratuitous benefactor. No decision before the present one has recognized any such principle; no trace of any such doctrine can be found in the Washington statutes or decisions, which admittedly control these cases.

The administrative consequences of such a rule are serious. Most projects require a very long period before final completion. Thus, the lands for which water is first made available have a supply of water considerably in excess of that which they are entitled to receive upon completion of the water system. Moreover, as has long been recognized in arid regions, more water is needed during the first years of irrigation than is subsequently required. *Federal Reclamation by Irrigation,* Sen. Doc. 92, 68th Cong., 1st Sess., p. 78; Widtsoe, *Principles of Irrigation Practice* (1926), pp. 334–335; 344–345. Consequently, the practice of the Secretary has been to allow the lands for which water was first made available to receive excess water pending completion of the project. In many cases, as in these, he will now be met by a claim that this gratuity has ripened into an inviolable property right. The necessary effect must be

that the Secretary of the Interior is either unable to deliver the water to the other lands or must incur substantially increased costs in order to do so. In either event, the result must be to deplete the irrigation fund, which was intended to be self-sustaining. See *Swigart* v. *Baker*, 229 U. S. 187.

Second. The opinion of the Court disregards entirely the applicable Washington law, which admittedly governs here.[1] Section 8 of the Reclamation Act, c. 1093, 32 Stat. 390; see *Power Co.* v. *Cement Co.*, 295 U. S. 142, 164–165. The Supreme Court of Washington fully recognizes the distinction between a water right based upon actual, direct diversion from the natural flow of a stream, and a water right based upon a contract with one who has himself made such diversion and has stored the diverted water in an artificial reservoir. In cases involving the second type of water right, that court has repeatedly indicated that the contract must be looked to for a determination of the extent of the right. *Lanham* v. *Wenatchee Canal Co.*, 48 Wash. 337, 338; *Shafford* v. *White Bluffs Co.*, 63 Wash. 10, 17; *Madison* v. *McNeal*, 171 Wash.

[1] So far as the opinion of the Court relies on Section 8 of the Reclamation Act, making the water *right* "appurtenant to the land irrigated" and "beneficial use * * * the basis, the measure, and the limit of the right", it is plain from the legislative history that this provision was not intended to convey a property right in the water but was designed to prevent speculative acquisition of the rights for sale elsewhere. See H. Rep. No. 1468, 57th Cong., 1st Sess., p. 7; 35 Cong. Rec. 1385, 6679.

669, 680; *Wenatchee Recl. Dist.* v. *Titchenal*, 175 Wash. 398, 403–404. Not only does the Washington court recognize this distinction, but it holds in the case where water is delivered to the landowner from a reservoir that the owner of the reservoir is the owner of the water stored therein.[2] *Dunsmuir* v. *Port Angeles Gas Co.*, 24 Wash. 104, 114; *Methow Cattle Co.* v. *Williams*, 64 Wash. 457, 460; *Madison* v. *McNeal, supra*, 674. It is for this reason that petitioner contends that the United States, owner of the reservoir, and owner of the water which must be delivered to respondents pursuant to the terms of their water contracts and applications, is an indispensable party to any proceeding involving a determination of the quantum of such water rights. The decision of this Court to the contrary cannot but prove disturbing in an important field of law which had been thought to be settled.

Petitioner does not contend that the Government owns the water *rights*. The pleadings amply show that petitioner concedes respondents' ownership of the contractual water rights. But petitioner

[2] Most arid land States concur in this view. *Wrathall* v. *Johnson*, 86 Utah 50, 76–77; *Washington County Irr. Dist.* v. *Talboy*, 55 Idaho 382, 389–390; *Vaughan* v. *Kalb*, 130 Ore. 506, 511–516; *Hagerman Irr. Co.* v. *McMurry*, 16 N. M. 172, 180–181; *Ball* v. *Kehl*, 95 Cal. 606, 613. Colorado appears to be the sole exception. In that State the reservoir owner and immediate diverter is limited to the rights of a mere carrier. *Pioneer Irrigation Co.* v. *Board of Commissioners*, 236 Fed. 790, 792 (D. Colo.).

does maintain that the United States owns the *water* which is necessary to satisfy respondents' water rights, and therefore insists that the United States is an indispensable party to any controversy, the result of which, as here, necessarily involves a delivery of its own property to satisfy adverse claims asserted by others.

It is, moreover, to be noted that the Washington law specifically recognizes the United States as a diverter and as an appropriator from the natural flow of the Yakima River for the very project involved in the instant case. 8 Remington's Rev. Stat., Sec. 7408 *et seq.* And the appropriation of the United States made pursuant to this statute was not affected by the Washington Act of 1917, Laws 1917, c. 117, Sec. 39, relied on in the opinion of the Court to establish ownership of the water in the landowners, since the 1917 statute (c. 117, Sec. 1) in terms declares that—

> Nothing contained in this act shall be construed to lessen, enlarge, or modify the existing rights of any riparian owner, or any existing right acquired by appropriation, or otherwise.

Third. To sustain petitioner's position that an injunction may not issue against him to enforce a contract of the United States would not leave respondents helpless against any administrative abuse. The Court of Claims is open to them, *North Platte C. & C. Co.* v. *United States*, 48 C. Cls. 281, as are the District Courts under the Tucker

Act. If respondents' contentions were sustained in a suit for damages, it must, of course, be assumed that petitioner and his successors would thereafter make water deliveries in conformance with the decision. See *Ex parte Grossman*, 267 U. S. 87, 121.

Wherefore your petitioners respectfully pray that this petition be granted, the mandates be stayed, and the decrees of the court below be reversed.

Copies of this petition will be served upon opposing counsel.

STANLEY REED,
Solicitor General.

I certify that this petition is presented in good faith and not for delay.

STANLEY REED,
Solicitor General.

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